Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

OI-NEG TV PRODUCTS, INC.,

Petitioner,

vs.

CARMELA F. DURKO,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the facts of this case, the courts below, in not requiring the employee to prove that the employer had timely and adequate actual or constructive knowledge that she was being sexually harassed, are in conflict with this Court's decision in *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986)?

2. Whether, under the facts of this case, the courts below, in failing to afford the employer an opportunity to demonstrate the effectiveness of its grievance procedure, are in conflict with this Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed.2d 49 (1986)?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were the petitioner, OI-NEG TV Products, Inc. (the "Employer"), and Glass, Molders, Pottery, Plastics & Allied Workers International AFL-CIO, CLC No. 243 (the "Union"), as the defendants, and the respondent, Carmela F. Durko (the "Employee"), as the plaintiff.

Nippon Electric Glass Co., Ltd. is the parent company of Techneglas, Inc. (formerly, OINEG TV Products, Inc.). Techneglas has a 15% equity ownership interest in Hankuk Electric Glass Co., Ltd.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
I. Under The Facts Of This Case, The Courts Below, In Not Requiring The Employee To Prove That The Employer Had Timely And Adequate Actual Or Constructive Knowledge That She Was Being Sexually Harassed, Are In Conflict With This Court's Decision In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106, S. Ct. 2399, 91 L. Ed. 2d 49 (1986)	4
II. Under The Facts Of This Case, The Courts Below, In Failing To Afford The Employer An Opportunity To Demonstrate The Effectiveness Of Its Grievance Procedure, Are In Conflict With This	

Contents

	Page
Court's Decision In *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986)	13
Conclusion	17

TABLE OF CITATIONS

Cases Cited:

Andrews v. Philadelphia, 895 F.2d 1469 (3rd Cir. 1990)	4, 5
Baker v. Weyehaeuser, 903 F.2d 1342 (10th Cir. 1990)	5
Bouton v. BMW of North America. Inc., 29 F.2d 103 (3rd Cir. 1994)	13
Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981)	5
Durko v. OI-NEG TV Products Inc., et al., 870 F. Supp. 1278 (M.D. Pa. 1994)	1
Durko v. OI-NEG TV Products Inc., et al., 870 F. Supp. 1268 (M.D. Pa. 1994)	1
Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982)	5
Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987)	5

Contents

	Page
Katz v. Dole, 709 F.2d 251 (4th Cir. 1983)	5
Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986)	i, 4, 12, 13
Steele v. Offshore Shipbuilding. Inc., 867 F.2d 1311 (11th Cir. 1989)	4
Statutes Cited:	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1331	3
28 U.S.C. § 1367(a)	3
42 U.S.C. § 1981a(a)(1)	2
42 U.S.C. § 2000e	3
42 U.S.C. § 2000e-2	2
42 U.S.C. § 2000e-2(a)(1)	2
42 U.S.C. § 2000e-3	2
42 U.S.C. § 2000e-5	2
42 Pa. C.S.A. § 951	3

Contents

Page

Rule Cited:

Fed. R. Civ. P. 50 11

APPENDIX

Appendix A — Judgment of the United States Court of Appeals for the Third Circuit Dated November 12, 1996 ..... 1a

Appendix B — Memorandum and Order of the United States District Court of Pennsylvania Filed December 29, 1995 ..... 3a

Appendix C — Judgment of the United States District Court, Middle District of Pennsylvania Filed September 28, 1994 ..... 23a

Appendix D — Excerpts of Transcript of Proceedings Dated September 21, 1994 ..... 29a

Appendix E — OI-NEG TV Products Inc. Harassment Policy 41a

The Employer respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit (the "Third Circuit"), affirming the judgment of the United States District Court for the Middle District of Pennsylvania (the "District Court"), relative to the merits of the claims asserted by the Employee.

OPINIONS BELOW

Included in the appendix are the orders and opinions rendered on the merits of the Employee's claims against the Employer, to wit: (1) the Judgment Order of the Third Circuit dated November 12, 1996 affirming the judgment entered by the District Court (1a)[1]; (2) the Memorandum and Order of the District Court dated December 29, 1995 denying the Employer's post-trial motion (3a); and (3) the Judgment of the District Court dated September 28, 1994, entering judgment in favor of the Employee and against the Employer in the amount of $50,000 and against the Union in the amount of $75,000. (23a.)

By way of Memorandum and Order dated December 31, 1995, the District Court also denied the Union's post-trial motion. The District Court also denied the motion for summary judgment that was filed on behalf of the Employer, which is reported in 870 F. Supp. 1278 (M.D. Pa. 1994), and the motion for summary judgment that was filed on behalf of the Union which is reported in 870 F. Supp. 1268 (M.D. Pa. 1994).

STATEMENT OF JURISDICTION

The judgment of the Third Circuit was entered on November 12, 1996. This petition for writ of certiorari was timely filed. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

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1. Page references herein are to the pages in the appendix.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a)(1), provides as follows:

> (a) It shall be an unlawful employment practice for an employer —
>
> > (1) . . . to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 1981a(a)(1), provides, in pertinent part, as follows:

> In an action brought by a complaining party under section 707 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of disparate impact) prohibited under section 703, 704, 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed under subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

STATEMENT OF THE CASE

On August 17, 1993, the Employee commenced this action against the Employer and the Union under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, and the Pennsylvania Human Relations Act ("PHRA"), 42 Pa. C.S.A. §§ 951, *et seq.*, alleging sex discrimination and hostile work environment sexual harassment. Jurisdiction was invoked in the District Court pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367(a).

The Employee testified that she was first sexually harassed in early June of 1991. In late September or early October of 1992, approximately sixteen months after the Employee was first sexually harassed, the Employer was served with the Employee's complaint, which she filed with the Pennsylvania Human Relations Commission (the "PHRC"). When the Employer received the Employee's PHRC complaint, it was the first time that any agent of the Employer had any knowledge, actual or constructive, that the Employee was being sexually harassed. On January 13, 1993, the Employee was moved into another department and was no longer working with any of her alleged harassers. The only allegations of sexual harassment which arose thereafter involved moaning and "oinking" sounds emanating from the intercom system at the plant. Although the Employee testified that she reported this sexual harassment to management, the record indicated that no report was made until approximately three months after the Employee filed her complaint with the District Court.

At the conclusion of a week-long trial, the jury returned a special verdict on September 26, 1994. (25a.) Concerning the Employee's principal claims of sex discrimination, the jury returned verdicts on behalf of the Employer and the Union. (25a and 27a.) On the issue of sexual harassment, the jury found for

the Employee. (26a.) With respect to the Employer, the jury found that the Employer was aware that the Employee was being subjected to a sexually hostile work environment and failed to take appropriate corrective action. (26a.) The jury awarded the Employee compensatory damages against the Employer in the amount of $50,000. (26a.)

The Employer and the Union both filed timely post-trial motions which were denied by the District Court by way of memoranda and orders dated December 29, 1995 (3a) and December 31, 1995, respectively. The Employer and the Union both filed timely appeals to the Third Circuit which were denied by judgment order dated November 12, 1996. (1a.)

REASONS FOR GRANTING THE WRIT

I.

UNDER THE FACTS OF THIS CASE, THE COURTS BELOW, IN NOT REQUIRING THE EMPLOYEE TO PROVE THAT THE EMPLOYER HAD TIMELY AND ADEQUATE ACTUAL OR CONSTRUCTIVE KNOWLEDGE THAT SHE WAS BEING SEXUALLY HARASSED, ARE IN CONFLICT WITH THIS COURT'S DECISION IN *MERITOR SAVINGS BANK V. VINSON,* 477 U.S. 57, 106, S. CT. 2399, 91 L. ED. 2D 49 (1986).

This Court has instructed courts to look to agency principles in determining whether an employer is liable for a sexually hostile work environment. *Meritor Savings Bank v. Vinson,* 477 U.S. 57, 72, 106 S. Ct. 2399, 2408, 91 L. Ed. 2d 49, 63 (1986). To apply the law of agency under *Vinson,* the trial court must apply *respondeat superior. Andrews v. Philadelphia,* 895 F.2d 1469, 1486 (3rd Cir. 1990); *Steele v. Offshore Shipbuilding, Inc.,* 867 F.2d 1311, 1316 (11th Cir. 1989). Under *respondeat*

superior, the employee must prove that the employer had actual or constructive knowledge about the existence of a sexually hostile work environment. *Baker v. Weyehaeuser*, 903 F.2d 1342, 1345 (10th Cir. 1990); *Andrews,* 895 F.2d at 1486; *Steele*, 867 F.2d at 1316; *Hicks v. Gates Rubber Co.,* 833 F.2d 1406, 1415 (10th Cir. 1987); *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983); *Henson v. City of Dundee,* 682 F.2d 897, 905 (11th Cir. 1982); *Bundy v. Jackson,* 641 F.2d 934, 943 n. 8 (D.C. Cir. 1981).

Several circuit courts have discussed the issue of what level of employee needs to have knowledge of the harassment in order to hold the employer liable. *See, e.g., Baker,* 903 F.2d at 1345; *Andrews,* 895 F.2d at 1486. But whether sufficiently high level employees had knowledge is not implicated in this case. Rather, the issue is *when* the knowledge was received and the *sufficiency* of that knowledge. Indeed, implicit within the requirement that the employer must have actual or constructive knowledge of the harassment is that such actual or constructive knowledge be timely and adequate.

The Employee testified that she was first harassed in early June of 1991. In late September or early October of 1992, approximately *sixteen* months after the Employee was first harassed, the Employer was served with the Employee's PHRC complaint. When the Employer received the Employee's PHRC complaint, it was the first time that any agent of the Employer had *any* notice, actual or constructive, that the Employee had been subjected to sexual harassment. This notice, however, was not very telling.

Buried at the end of her PHRC complaint, which dealt nearly entirely with the Employee's sex discrimination claims, the Employee set forth a single, non-specific, conclusory allegation concerning sexual harassment. In relevant part, the Employee's PHRC complaint, which she prepared with the aid of counsel, provided as follows:

> [The Employer has] maintained a hostile work environment with respect to women, inasmuch as [the Employee] and other woman (sic) have been subjected to frequent offensive comments pertaining to their bodies, suggestive and lewd remarks, and comments concerning their attire.

Significantly, the Employee failed to name her harassers, failed to give any time frame in which the harassment occurred and failed to notify the Employer even once that she was being sexually harassed.

Based on the notice of sexual harassment that the Employer received via the Employee's PHRC complaint (albeit untimely and minimal), the Employer conducted a full investigation, but received no cooperation from the Employee and was unable to find any evidence of sexual harassment. Notably, in the late spring or early summer of 1992, the Employee had the opportunity to discuss any such harassment with the Employer's Assistant Human Resources Supervisor, Margaret Guffrovich ("Guffrovich"), but the Employee just "stared at the floor and refused to answer [Guffrovich's] questions." The Employee conceded this point by testifying, "I didn't tell her nothing in there."

While there was testimony that the Employee made reports of sexual harassment to Union stewards, there was no testimony or evidence that any agent of the Employer had any notice of sexual harassment prior to the Employee's filing of her PHRC complaint. As a matter of law, in light of the sixteen-month interval from the time when the harassment first took place until the time when the Employer received the Employee's PHRC complaint and the Employee's subsequent refusal to cooperate with Guffrovich, the Employee failed to prove that any agent of

the Employer had timely or sufficient knowledge of the harassment to be held liable under principles of agency.

After filing her PHRC complaint, the Employee remained in the same department for only approximately four months. On January 13, 1993, the Employee was moved into another department and was no longer working with any of her alleged harassers. The only allegations of sexual harassment which arose thereafter involve moaning and "oinking" sounds emanating from the intercom system at the plant.

The Employer did not have any knowledge of this harassment until November or December of 1993, when the Employee complained to the Employer's Human Relations Supervisor, Bill Konopasek ("Konopasek"). Significantly, the Employee failed to prove that any agent of the Employer had any knowledge of this harassment until approximately two and one-half years after the alleged harassment first occurred and approximately three months after the Employee filed her complaint with the District Court.

Indeed, the Employee failed to prove that prior to the time that she filed her complaint with the District Court, the Employer had any meaningful knowledge of the existence of a sexually hostile environment, other than her untimely, bald allegation set forth in her PHRC complaint, upon which she refused to elaborate. The following excerpts from the Employee's examination are illustrative:

> Q. During the time you were having this training, you indicated that some very distasteful, some very off-colored obscene remarks were made to you by certain people. . . .

When those questions were asked to you, you indicated — I believe in your testimony — that they were revulsive and that they were hard to tolerate, that they were offensive . . . and that there were a whole series of people that you went to discuss what was going on with the people who were making those remarks to you. Do you recall that?

A. Yes.

Q. I think you indicated that you went to a Mr. Thompson?

A. Yes, I did.

Q. And a Mr. Lutecki?

A. Yes, I did.

Q. And Mr. — I believe it's Warnick and a Mr. Moska. Are any of those people in management?

A. No, they're Union.

Q. They're Union. Did you ever, when these revolting things were being done, go to anyone in management and make a complaint?

A. No, I didn't.

(30a-31a.)

. . .

Q. This document is dated February 6, 1992. It says "date filed." That's the only date I see on it, but do you see . . . any reference to any sexual harassment in terms of either comments, as to your dress, or —

A. No, I don't.

(33a.)

. . .

Q. In looking at that, do you see any reference to any type of sexual harassment either in terms of comment to your dress or just outrageous names called to you?

A. No, I don't.

(35a.)

Q. In the paragraph called, What has happened — "What happened?" Again, is there any reference to any sexual harassment against you in terms of either commenting upon how you were attired or dressed or in calling you outrageous names?

A. No, there isn't.

(35a.)

. . .

Q. Is there any reason why, when you were filing these grievances, that you did not indicate that this conduct was taking place, that members of the Union, the very Union that you belong to, were, you know, calling you just outrageous names, for which there was no justification?

A. Because I didn't even get answers to these. How was I going to get answers to those?

Q. But then you're saying that because they wouldn't support you in one area, you weren't going to bother with the sexual harassment charges?

A. I told them about the sexual harassment charges. They never put it down on paper. They put this down on paper, though.

Q. Well, is there a difference?

A. Yes.

Q. I mean, if you made a complaint that you were denied a job and they weren't going to help you, you still made the complaint and the grievances four times, right?

A. That was the only thing I was allowed to put down on paper.

(36a-37a.)

. . .

> Q. Did you ever once, when this was happening, go to management and say, you know, "This is happening to me. I'm trying to do the proper thing. I'm trying to grieve this in accordance with our contract. This is what governs our relationship, and they won't let me do it." Did you ever go to management, to the Company, and say that?
>
> A. No, I didn't.

(37a.)

Additionally, the Employee did not prove that the Employer had constructive knowledge of any alleged hostile work environment sexual harassment due to pervasiveness. The District Court itself was "troubled" by the lack of specificity and the lack of corroboration with respect to the Employee's testimony. During a bench conference at the close of the Employee's case in chief, prompted by motions for judgment pursuant to Fed. R. Civ. P. 50 by the Employer and the Union, raising both the lack of specificity offered by the Employee and the lack of corroboration of her claims, the District Court expressed its reservations concerning the wisdom of continuing to allow the Employee's allegations of sexual harassment to proceed further:

> Well, I think you are at a disadvantage that it is easier to defend when you have some specificity with respect to matters, particularly of this nature. I do think you are handicapped by that, and it's difficult obviously to defend on that.

> Mr. Thomson on the stand he's going to have to say, you know, it didn't happen that way or it never happened or — I'm not sure what he's going to say, and the same things with respect to the others. But I do think in a case like this it's the quality of the [Employee's] evidence and it is unfortunate, it seems to me, if you have a — if the claim was going to be that essentially that there was pervasive sexual harassment here, you would think that there would be some corroboration on the [Employee's] part, someone who wanted to come forward and, you know, besides the husband, saying, This is what my wife told me, somebody else coming in and saying they witnessed some of this.
>
> It's hard to imagine that, with respect to the intercom contentions, there isn't somebody in the plant who would be able to corroborate that, if that, in fact, occurred in the manner that she says it has occurred, I'm very troubled by it.

(39a.)

It is respectfully submitted that this Court's holding in *Vinson* implicitly requires that, under agency principles, some agent of the Employer must have actual or constructive knowledge of the harassment, before an employee files her complaint with the court, in order to be held liable.

II.

UNDER THE FACTS OF THIS CASE, THE COURTS BELOW, IN FAILING TO AFFORD THE EMPLOYER AN OPPORTUNITY TO DEMONSTRATE THE EFFECTIVENESS OF ITS GRIEVANCE PROCEDURE, ARE IN CONFLICT WITH THIS COURT'S DECISION IN *MERITOR SAVINGS BANK V. VINSON,* 477 U.S. 57, 106 S. CT. 2399, 91 L. ED. 2D 49 (1986).

In *Vinson* this Court allowed for the possibility that an employer could escape liability if the employer had a grievance procedure that was sufficiently effective. *Bouton v. BMW of North America. Inc.* 29 F.2d 103, 107 (3rd Cir. 1994) citing *Vinson,* 477 U.S. at 73, 106 S. Ct. at 2408-2409, 91 L. Ed. 2d at 63. *A fortiori,* an employer with a grievance procedure must be afforded at least an opportunity to demonstrate the effectiveness of its grievance procedure.

In this ease, however, the Employer never was given a chance to demonstrate the effectiveness of its grievance procedure, because the Employee chose to ignore it until approximately two and one-half years after the alleged harassment first occurred and approximately three months after the Employee filed her complaint with the District Court.

In relevant part, the Employer's grievance policy provided as follows:

> Any employee or applicant that feels he or she has been harassed should report such incidents to his or her supervisor, personnel, or any member of management. All complaints must be handled in the strictest confidence. No form of reprisals will be

> taken against any person who presents a complaint of harassment.

(42a, 44a, 46a and 48a.)

The Employee knew of or should have known of the Employer's grievance procedure, because the Employer's grievance procedure was posted on eight different bulletin boards at the plant. Nevertheless, according to her own testimony, the Employee never apprised the Employer that she was allegedly being sexually harassed until at least late fall of 1993. The following excerpts from the Employee's examination are illustrative:

> Q. . . . Did you ever, when these revolting things were being done, go to anyone in management and make a complaint?
>
> A. No, I didn't.

(31a.)

. . .

> Q. Did you ever once, when this was happening, go to management and say, you know, "This is happening to me. I'm trying to do the proper thing. I'm trying to grieve this in accordance with our contract. This is what governs our relationship, and [the Union officials] won't let me do it." Did you ever go to management, to [OI-NEG], and say that?

A. No, I didn't.

(37a.)

Despite the Employer's grievance procedure which gave the Employee a choice of avenues in which to voice her complaint of sexual harassment (unlike the grievance procedure that this Court in *Vinson* found to be inadequate), and despite the Employee's testimony that she was getting nowhere with the Union with regard to her sexual harassment claims, the Employee's own testimony reflects that she only went to the shop steward with her allegations of sexual harassment until the late fall of 1993.

In other words, the harassment was ongoing for approximately two and one-half years before the Employee even *attempted* to utilize the Employer's grievance procedure. Indeed, the Employee even commenced the underlying lawsuit three months before attempting to utilize the Employer's grievance procedure. As a matter of law, the Employee should not be allowed to benefit from her decision to subvert the internal system which the Employer had in place to protect against sexual harassment by concealing facts from management and instead planning a lawsuit.

In both her papers filed with the District Court opposing the Employer's post-trial motions and in her brief to the Third Circuit, the Employee argued that the Employee's grievance procedure was put into effect on at least two occasions, one occasion dealing with the report of sexual harassment to Guffrovich, and the other occasion being the report of sexual harassment to Konopasek. With respect to the "report" to Guffrovich, the Employee did not provide the Employer with the names of her harassers or any other relevant information. Moreover, that report was not made until at least sixteen months

after the alleged sexual harassment had first occurred, and after the Employee had filed her PHRC complaint. With respect to the report to Konopasek, that report was not made until approximately two and one-half years after the alleged harassment first occurred and approximately three months after the Employee filed her District Court complaint.

Given the Employee's refusal to attempt to comply with the Employer's grievance procedure until approximately two and one-half years after the sexual harassment first occurred, and three months after the Employee filed her District Court complaint, it was impossible for the Employer to demonstrate the effectiveness of its grievance procedure.

It is respectfully submitted that the law must require an employee at least to attempt to comply with her employer's grievance procedure prior to filing a complaint in court before an employer is saddled with the burden of establishing the effectiveness of its grievance procedure. To conclude otherwise would be to reward an employee who plots and schemes to bring about a lawsuit rather than attempting to bring about a prompt end to the harassment by using the employer's grievance procedure.

CONCLUSION

For these reasons, the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED NOVEMBER 12, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 96-7061 and 96-7062

CARMELA F. DURKO

v.

OI-NEG TV PRODUCTS, INC.; GLASS, MOLDERS, POTTERY, PLASTICS & ALLIED WORKERS INTERNATIONAL AFL-CIO, CLC NO. 243

OI-NEG TV PRODUCTS, INC.,

Appellant in No. 96-7061

GLASS, MOLDERS, POTTERY, PLASTICS & ALLIED WORKERS INTERNATIONAL ALF-CIO, CLC NO. 243,

Appellant in No. 96-7062

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 93-cv-01284)
District Judge: Hon. Thomas I. Vanaskie

Submitted Pursuant to Third Circuit LAR 34.1(a)
October 29, 1996

Before: SCIRICA and COWEN, *Circuit Judges* and FEIKENS*, *District Judge*

---

* Honorable John Feikens, United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix A

JUDGMENT ORDER

After considering the contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgments of the district court entered on December 29, 1995, and January 2, 1996, be and are hereby affirmed, substantially for the reasons set forth by Judge Vanaskie in his opinions filed December 29, 1995, and December 31, 1995. Costs taxed against appellants.

ATTEST:

s/ P. Douglas Sisk
P. Douglas Sisk, Clerk
Dated: Nov. 12, 1996

By the Court,

s/ Robert E. Cowen
Robert E. Cowen
CIRCUIT JUDGE

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT OF PENNSYLVANIA FILED DECEMBER 29, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 4:CV-93-1284

(JUDGE VANASKIE)

CARMELA F. DURKO,

Plaintiff

v.

OI-NEG TV PRODUCTS, INC., AND GLASS, MOLDERS, POTTERY, PLASTICS & ALLIED WORKERS INTERNATIONAL UNION AFL-CIO, CLC No. 243,

Defendants

MEMORANDUM

Presently pending before this Court is the post-trial motion filed by defendant, OI-NEG TV Products (hereinafter referred to as the "Employer"), in connection with the sexual harassment claim of plaintiff Carmela F. Durko. Pursuant to Rule 50 of the Federal Rules of Civil Procedure, the Employer has renewed its Motion for Judgment as a Matter of Law. In the alternative, it seeks a new trial under Fed.R.Civ.P. 59.

The Employer contends that as a matter of law it cannot be held liable for hostile environment sexual harassment because it had an effective grievance procedure which was known to Durko

and would have eradicated any alleged sexual harassment had she availed herself of it. Additionally, it asserts that as a matter of law it cannot be held liable for hostile environment sexual harassment through *respondent superior* liability because Durko failed to establish that the Employer was aware of the alleged actions of harassment taken against the plaintiff. (Dkt. Entry # 80 at 2.) For the following reasons the Employer's Motion will be denied.

I. BACKGROUND

On August 17, 1993, plaintiff Carmela F. Durko commenced this employment discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, *et. seq.*, and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa.C.S.A. §§951 *et. seq.* Durko named as defendants the Employer and her collective bargaining representative, Glass, Molders, Pottery, Plastics & Allied Workers International Union AFL-CIO, CLC No. 243 (hereinafter referred to as the "Union"). With respect to the Employer, Durko alleged a series of acts taken against her which she maintained constituted hostile environment sexual discrimination.

Following the denial of motions for summary judgment separately pursued by each defendant, a jury trial was conducted from September 20, 1994, to September 26, 1994.[1] With respect

---

1. At the close of the presentation of the plaintiff's case in chief and at the close of all the evidence, both defendants moved for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure. After deferring ruling on those motions and submitting the matter to the jury on special verdict interrogatories, this Court denied defendants' aforementioned motions. (Dkt. Entry # 76.)

to the Employer, the jury found that her Employer was aware that she was being subjected to a sexually hostile work environment and failed to take appropriate corrective action. The jury awarded Durko compensatory damages against the Employer in the amount of $50,000. (Dkt. Entry # 72.)

With respect to the Union, the jury found that Durko proved by a preponderance of the evidence that she was subjected to hostile environment sexual harassment and that the Union discriminatorily failed to pursue sexual discrimination grievances on her behalf. The jury awarded Durko $50,000 in compensatory damages and $25,000 in punitive damages against the Union. *Id.* This Court entered judgment on September 28, 1994.[2] (Dkt. Entry # 79.)

II. DISCUSSION

A. *Standard of Review*

A motion for judgment as a matter of law should be granted only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury could reasonably find liability. *Wittekamp v. Gulf & W. Inc.* 991 F.2d 1137, 1141 (3rd Cir.), *cert. denied*, 114 S.Ct. 309 (1993); *Billet v. CIGNA Corp.*, 940 F.2d 812, 815 (3rd Cir. 1991). In determining whether the evidence is sufficient to sustain liability, the court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for

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2. The jury found in favor of both defendants with respect to Durko's claim that each defendant had discriminated against her in her efforts to secure the position of assistant furnace operator.

the jury's version. *Fineman v. Armstrong World Indus.*, 980 F.2d 171, 190 (3rd Cir. 1992), *cert. denied*, 113 S.Ct. 1285 (1993). Although judgment as a matter of law should be granted sparingly, a scintilla of evidence is not enough to sustain a verdict of liability. *Walter v. Holiday Inns. Inc.*, 985 F.d 1232, 1238 (3rd Cir. 1993). "The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party." *Patzig v. O'Neil*, 577 F.2d 841, 846 (3rd Cir. 1978) (citation omitted) (quotation omitted).

It is well-settled that a court can grant a new trial if the verdict was against the weight of the evidence. *Shanno v. Magee Industrial Enterprises, Inc.*, 856 F.2d 562, 567 (3rd Cir. 1988). However, a jury's verdict should not be lightly overturned on the ground that the verdict was against the weight of the evidence. *See Williamson v. Conrail*, 926 F.2d 1334, 1348 (3rd Cir. 1991). A new trial is generally warranted only when the trial judge is satisfied there has been a miscarriage of justice. This standard has evolved so as "to ensure that a district court does not substitute its 'judgment of the facts and the credibility of the witnesses for that of the jury.' " *Fineman*, 980 F.2d at 211. In reaching its determination, the court must view all evidence and inferences reasonably drawn therefrom in the light most favorable to the party with the verdict. *Marino v. Ballestas*, 749 F.2d 162, 167 (3rd Cir. 1984).

B. *The "Effective Grievance Procedure" Issue*

In *Harris v. Forklift Sys.*, 114 S.Ct. 367 (1993), the United States Supreme Court addressed the "hostile work environment" theory of harassment and reaffirmed its earlier ruling in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986). Those decisions

direct that such harassment is actionable if it affects a "term, condition, or privilege of employment within the meaning of Title VII" and is so severe or pervasive that it alters the conditions of employment and creates an "abusive working environment." *Id.*, 477 U.S. at 67.

In support of its motion, the Employer first asserts that it is entitled to a judgment after trial or a new trial because the evidence established that it had an effective grievance procedure which was known to the plaintiff and that she failed to avail herself of it. *See* Def. Employer's Br. (Dkt. Entry # 91) at 7-8. In support of this assertion, plaintiff's Employer relies upon *Bouton v. BMW of N. Am.*, 29 F.3d 103 (3rd Cir. 1994). With respect to this issue, our Court of Appeals in *Bouton* stated:

> In sum we hold that an effective grievance procedure — one that is known to the victim and stops the harassment — shields the employer from Title VII liability for a hostile environment. By definition, there is no negligence if the procedure is effective.

Id. at 110.

The Employer argues that it was established at trial that Durko knew or should have known of her Employer's grievance procedure because it was posted on eight different bulletin boards at the facility. It further asserts that Durko never apprised management that she was allegedly being sexually harassed. Durko's Employer finally contends it was never afforded the opportunity to demonstrate the effectiveness of its grievance procedure because Durko chose to ignore it. Based on this, the defendant Employer relies upon *Bouton*, specifically noting that

the *Bouton* court emphasized the fact that the employee therein refused to avail herself of a potentially effective grievance procedure. *See Bouton,* 29 F.3d at 103; *See* Def. Employer's Br. (Dkt Entry # 91) at 7.

Durko responds by contending that the evidence at the trial indicated that Durko made known to management her complaints of harassment. Despite this, even after she made the complaints, no one was ever disciplined and the harassment continued. Durko, therefore, contends that any grievance procedure was obviously ineffective, thereby subjecting the Employer to liability for a hostile work environment based on sexual harassment. *See* Pl.'s Br. (Dkt. Entry # 96) at 7-8.

A review of the record supports Durko's position. Durko testified that she had been the victim of sexual harassment from June of 1991 to January of 1993, while she was attempting to secure a position as Assistant Furnace Operator. When she returned to work in the Forming and Selecting department in January of 1993 she continued to be the object of harassing abuse, including broadcasts over an intercom system which transmitted sound throughout the plant. The harassing broadcasts over the system consisted of Durko being called derogatory names, and her name being yelled loudly followed by moaning or animal sounds. Specifically Durko's trial testimony revealed:

> Q. Can you give the jury specific names that you remember being called over the loudspeaker in January of '93 and beyond that?
>
> A. A scum, a pig, a cow, and moans, lots of moans and my name being screamed really loud.

(Tr. Vol. I, at 155.) When asked what she did about this, Durko responded that she told her foreman, Lenny Brown, and the head of her local union, Peter Moska, about the incident. She then testified that she and Peter Moska both went into the office of Bill Konopasek, who served as Human Resource Supervisor and was a member of management. (*Id.* at 156.) Durko stated that she complained to Konopasek about the harassment to which she was being subjected, and that he heard and understood those complaints. (Tr. Vol II, at 96.)

The record indicates that as a result of this meeting, Konopasek put speakers in his office so that he would be able to monitor the intercom, but no other corrective or investigative steps were taken. He indicated that without knowing who was transmitting these sounds over the intercom system, or from where in the plant the broadcasts were coming, there was nothing he could do about it.[3] (Tr. Vol III, at 5.)

Thus, there was evidence that Durko brought her claims of a hostile work environment to the attention of the Employer's management through her complaint to her foreman and her meeting with Konopasek. Despite this, the harassment continued. When questioned about any changes resulting from her meeting with Konopasek, Durko testified:

> A. They still did it.
>
> Q. And —

---

3. Bill Konopasek's testimony contradicted that of Durko with respect to their meeting in that he testified that she complained of only "oink, oink" sounds being broadcast, and that she told him that her name was never used. (Tr. Vol. III, at 5.)

A. And it was different, but they still did it.

Q. Is it continuing — did it continue through the end of your time in Forming and Selecting?

A. Until I left Forming and Selecting, yeah.

(Tr. Vol I, at 156.)

At a different point, while also addressing the meeting involving Konopasek, Peter Moska, and Durko, during which the offensive broadcasts were discussed, Durko testified as follows:

Q. And did they take immediate steps, the Company, to stop the system from being used by people to do such outrageous things.

A. Not that I know of, no.

Q. Are you saying it continued?

A. Yes, it did.

Q. And for how long did it continue.

A. Until I left the department [in February of 1994].

(Tr. Vol. II, at 43.)

Similarly, at a later point of the trial, Durko testified:

> Q. And what, if any, action did Mr. Konopasek do — take?
>
> A. Nothing.

(Tr. Vol. II, at 91.)

> Q. And did anything good happen as a result of your meeting with Mr. Konopasek from management?
>
> A. No, it got worse.

(*Id.* at 96.) This evidence establishes that even after Durko informed management of the hostile work environment she was forced to endure, the situation did not improve.

Thus, contrary to its assertions, the Employer did have the opportunity to demonstrate the effectiveness of its grievance procedure.[4] *See* Def. Employer's Br. at 8. Durko brought her complaints to those within the Company empowered to redress and correct them. However, the record permits an inference that

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4. Konopesak testified that the Employer's policy on sexual harassment sets forth the procedure an employee is to follow if that employee is subject to harassment. It directs that employees who feel that they have been harassed are to make a complaint either through their department or through their immediate supervisor. Such complaints will eventually be referred to Konopesak. (Tr. Vol III, at 10.) The testimony of Durko and others that Durko informed Konopesak of her complaints shows that she substantially complied with the Employer's policy and procedure for processing sexual harassment claims.

the Employer failed to take *any* action in response to her claims of a hostile work environment. This evidence also permits the inference that the Employer's grievance procedure was ineffective.

It is exactly this lack of an *effective* grievance procedure in the instant case that distinguishes it from *Bouton*. In *Bouton*, while stating that prompt and effective action by an employer will relieve it of liability, our Court of Appeals also directed that "[f]ailure to investigate and remediate will result in employer liability." *Bouton*, 29 F.3d at 107. In *Bouton* the facts revealed that the employer acted promptly and effectively when it was notified of possible harassment. *Id.* at 108. When the employer's Human Resources Development Manager received complaints from the plaintiff he investigated promptly *and* remedial action was implemented. *Id.* at 107 n.5. Thus, on these facts the *Bouton* court absolved the employer from liability for a hostile environment. *Id.* at 108.

Conversely, as previously examined, the evidence of the instant case permits the reasonable inference that Durko availed herself of the Employer's grievance procedure, but it was ineffective. The record does not establish that the Employer had in place an *effective* grievance procedure.[5] On the contrary, the Employer's inaction when confronted with complaints of disgusting conduct permits the opposite conclusion.[6] An

5. The Employer did not present any evidence, such as statistical data pertaining to this grievance mechanism, to substantiate its assertion that it was effective. The mere existence of a grievance process does not insulate an employer from liability under Title VII. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

6. In this regard it must be noted that the Employer was aware of Durko's complaint of a hostile work environment as early as September 30,

(Cont'd)

ineffective grievance procedure will not allow an employer to escape liability. The evidence permits the inference that this is a case in which, as the *Bouton* court directed, the failure to investigate and remediate will result in Employer liability.[7] Thus, the Employer's motion on this issue will be denied.

C. *The Existence of Respondeat Superior Liability*

Our Court of Appeals has held that an employee seeking to establish a claim for hostile work environment sexual harassment against an employer must prove five elements: (1) the employee suffered intentional discrimination because of employee's sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the employee; (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and (5) the existence of *respondeat superior* liability. *Andrews v. Philadelphia*, 895 F.2d

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(Cont'd)

1992, when it received her PHRC complaint. *See* Def. Employer's Reply Br. (Dkt. Entry # 101) at 4. The evidence indicates that the Employer failed to take appropriate action when Durko's first claims of sexual harassment came to its attention.

7. In its reply brief defendant Employer argues that based on the short time period between the time the Employer's management was informed of the harassment and when this action was filed, it was not given the opportunity to cure this harassment. (Dkt. Entry # 101.) This position is untenable. The testimony of Konopesak indicates that after he was informed of the harassment over the intercom, the only action he took was putting an intercom in his office. No investigation or further inquiry into the matter was to follow. He testified that after Durko and Moska left his office after reporting the harassment, as far as he was concerned, that was the end of the matter. (Tr. Vol III, at 5-32.) Essentially, the Employer took no action.

1469, 1482 (3rd Cir. 1990). A decision regarding hostile work environment should be made viewing the totality of the circumstances. *Id.* at 1484.[8]

Durko's employer submits that Durko failed to establish the fifth element of the test enunciated in *Andrews* — the existence of *respondent superior* liability. *See* Employer's Br. (Dkt. Entry # 91) at 9. In support of this contention the Employer asserts that Durko failed to prove that management-level employees had actual or constructive notice about the existence of a sexually hostile environment. *Id.* at 10.

The United States Supreme Court has instructed courts to use agency principles when deciding employer liability for sexually hostile work environments. *Bouton*, 29 F.3d at 106, *citing Meritor Sav. Bank. FSB*, 477 U.S. at 72. Under §219 of the Restatement (Second) of Agency there are three potential bases for holding employers liable for sexual harassment perpetrated by their employees: (1) torts committed by employees within the scope of their employment; (2) an employer's negligent failure to discipline or fire, or failure to take remedial action upon notice of harassment; and (3) actions taken by employees in reliance upon apparent authority or if they were aided by the agency relationship. *Bouton*, 29 F.3d at 106; *Guy v. Dav Prods.*, No. 94-1699, 1995 U.S. Dist. Lexis 17620 *13 (E.D. Pa. November 29, 1995).

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8. In *Harris, supra*, the United States Supreme Court substantially adopted the five elements which must converge to bring a successful claim for a hostile work environment under Title VII and by extension under the PHRA. *See Spain v. Gallegos*, 26 F.3d 439, 446 (3rd Cir. 1994); *Stewart v. Weis Markets, Inc.*, 890 F. Supp. 382, 389 (M.D. Pa. 1995).

Appendix B

The second source of potential liability is the only one implicated in the instant case. Agency principles direct that liability exists where the defendant knew or should have known of the harassment and failed to take prompt remedial action. *Andrews,* 895 F.d at 1486. Thus, if the evidence permits an inference that management-level employees had actual or constructive knowledge about the existence of a sexually hostile environment and failed to take prompt and adequate remedial action, the Employer's post trial motions must be denied. *See Andrews, supra; Katz v. Dole,* 709 F.d 251, 255 (4th Cir. 1983).

Durko has alleged, and the jury has found, that her Employer was aware that she was being subjected to a sexually hostile work environment and failed to take appropriate corrective action. *See* the Special Verdict Form (Dkt. Entry # 72) at 2. The defendant Employer asserts that despite the jury's determination, Durko failed to prove that management-employees had actual or constructive notice about the existence of a sexually hostile environment. In support of its assertion, the Employer cites to certain excerpts from the trial which include Durko's own testimony as well as the testimony of management witnesses of the Employer. (Dkt. Entry # 91 at 10-12.) In response, Durko submits that although the defendant employer cites a very narrow passage of Durko's testimony, which, ignoring all other testimony in the case, tends to indicate that plaintiff did not report being sexually harassed to management, there is a multitude of testimony, including that of the Employer's own witnesses, that indicates that Durko, either herself, or through a union representative, did make management aware of such complaints. *See* Pl.'s Br. in Opp. (Dkt. Entry # 96) at 6.

As previously stated in the preceding section of this Memorandum, a review of the relevant trial testimony

demonstrates that Durko did present sufficient evidence for the jury to reasonably find that Durko notified management-level officers of the Employer of the harassment, and that the Employer was, therefore, liable through *respondeat superior* liability. The testimony of Durko, Peter Moska, and Bill Konopasek establish that Durko, along with local union president Moska, met with Konopasek who was the Human Resource Supervisor and a member of management, to discuss repeated incidents of sexual harassment involving the use of the intercom system. (Tr. Vol. I, at 56, Vol II, at 43, 91, 96, Vol III, at 4-9, 14, Vol. IV, at 154.) Konopasek testified it was his duty, as Human Resource Supervisor, to oversee personnel and labor functions. (Tr. Vol III, at 4.)

Thus, a management-employee, who is specifically responsible for dealing with claims of harassment such as this, was made aware of the situation. There is, therefore, sufficient evidence to reasonably support the jury's finding that Durko's Employer was aware that she was being subjected to a sexually hostile work environment and failed to take appropriate corrective action. Further, there is sufficient evidence in the record to establish *respondeat superior* liability.[9]

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9. In its brief in support of its motion, the Employer cites certain trial testimony excerpts which, standing alone, tend to indicate that management-level employees did not have actual or constructive notice about the existence of a sexually hostile environment. *See* Def. Employer's Br. at 10-12. This testimony, which was heard by the jury, was contradicted by testimony tending to show Durko did put the Employer's management, through Bill Konopasek, on notice of the harassment. In considering motions for judgment as a matter of law or for new trial, the evaluation of witness credibility and of disputed testimony are matters clearly and solely within the province of the jury, and in the absence of clear error, that province should not be invaded by the court. *See Van Scoy v. Powermatic. Div. of Stanwich Industries Inc.*,

(Cont'd)

Appendix B

The instant case is distinguishable from the case of *Guy v. Day Prods.*, in which the court found no *respondeat superior* liability where the plaintiff at no time "inform[ed] the President, Vice President, or Human Resources Manager, that she believed she was being subjected to a sexually hostile work environment." *Guy v. Day Prods.*, No.94-1699, 1995 U.S. Dist. Lexis 17620, *17 (E.D. Pa. November 29, 1995). As explained above, Durko's actions in the instant case are contrary to those of the plaintiff in *Guy*, who "by failing to complain to anyone in a position to address her concerns, never gave any of the corporate defendants the chance to remedy her claims of sexually hostile work environment created by her supervisor and her co-workers." *Id.* at *20.

Aside from Durko's meeting with Konopasek, the Employer also received actual knowledge of sexual harassment complaints made by Durko through her complaint filed with the Pennsylvania Human Relations Commission ("PHRC"). The Employer states in its reply brief that it was served with Durko's PHRC complaint on September 30, 1992, and was thereby placed on notice of Durko's charges of a sexually hostile work environment. *See* Def. Employer's Reply Br. at 4.

In addition to the actual knowledge of the harassment the Employer received from Durko's meeting with Bill Konopasek, and its receipt of the PHRC complaint, it would also have been reasonable for the jury to have inferred that the Employer had constructive knowledge of the harassment through its

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(Cont'd)

810 F.Supp. 131, 134 (M.D. Pa. 1992). Because there is sufficient evidence to support the jury's finding of notice to the Employer and *respondent superior* liability that finding will not be overturned.

pervasiveness.[10] *See Henson v. Dundee*, 682 F.2d 897, 905 (11th Cir. 1982). Based on the foregoing, it is reasonable for the jury to have found that a requisite showing to establish *respondent superior* liability upon the Employer has been made. Thus, defendant Employer's motion on this issue will also be denied.

Next, Durko's Employer submits that Durko was unable to show that the conditions of her employment were altered or that she was subjected to a hostile work environment. It further maintains that Durko has failed to allege facts sufficient to show that the incidents were sufficiently severe or pervasive to create a hostile work environment. (Dkt. Entry # 91 at 13-15.)

These arguments must be rejected. Durko testified that she became the victim of a pattern of abuse when she sought to be the first woman employed as an assistant furnace operator. She also testified to being called vulgar names over an intercom system which broadcasted throughout the entire plant. She was subjected to loud moaning sounds followed by her name being screamed over the public address system, within the hearing of many employees. A reasonable interpretation of such moaning was that it contained a sexual connotation. (Tr. Vol. I, at 155-156.) This harassment was proven to be pervasive and regular, and it detrimentally affected Durko as it would a reasonable person of the same sex in that position.

As a result of the harassment, Durko stated that she would cry all the time. She lost all self-respect. She became very

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10. The jury was instructed, without objection, that "[t]he plaintiff can demonstrate that the employer knew of the harassment by showing . . . pervasiveness of the harassment . . . ." (Jury Charge (Dkt. Entry # 67) at 15.)

emotional and bitter. She found herself always on edge and feeling as if she had to prove herself all the time. (Tr. Vol. I, at 157.) The evidence is sufficient to show that the terms of her employment have been altered and that a hostile environment existed.

Finally, the Employer argues in its reply brief in support of this motion that the jury erroneously awarded compensatory damages to Durko for alleged harassment that occurred before it was served with Durko's PHRC complaint, which alleged such harassment. It them reiterates its previous arguments based on the existence of an effective grievance procedure and a lack of *respondent superior* liability. The Employer uses the service of the PHRC complaint to signify the point in time when it was put on notice for purposes of *respondeat superior* liability. It then submits, for the same reasons as previously advanced, that Durko should not be compensated for any harassment that occurred prior to the service of the PHRC complaint. This argument must be rejected. At no point did the Employer request that the jury be instructed to only award damages for harassment occurring after a certain time. Moreover, the evidence was such that the jury could have found that the Employer was aware of the sexual harassment before receipt of the PHRC complaint. The jury was instructed on this issue as follows:

> The plaintiff must also prove that the employer knew or should have known of the alleged harassment and failed to take remedial action. The plaintiff can demonstrate that the employer knew of the harassment by showing that she complained to management of the harassment, or by showing pervasiveness of the harassment

> which gives rise to the inference that the employer knew of such harassment.

See Jury Charge (Dkt. Entry # 67) at 15, and Tr. Vol V, at 146. This instruction is almost identical to the Employer's requested charge on this issue. (Dkt. Entry # 51 at 6.) While Durko was in the Batch and Furnace Department, harassment was indeed pervasive. At no time did the Employer ever request that the jury consider limiting damages to a certain point in time. Thus, the uncontested jury instructions permitted the jury to impose liability based on the cumulative impact of the harassment. Further, the Employer never objected to the special verdict questions on the issue of its liability. In pertinent part the special verdict form stated:

> Has Plaintiff proved by a preponderance of the evidence that (a) she was subjected to hostile work environment sexual harassment, and (b) that Techneglas was aware that she was being subjected to a sexually hostile work environment and failed to take appropriate corrective action?
>
> Under the law as given to you in these instructions, state the amount of compensatory damages Plaintiff should be awarded from Techneglas.

(Dkt. Entry # 72 at 2.) The Employer failed to pursue the argument it now advances. Accordingly, the Employer is not entitled to a new trial on the issue of damages.

Appendix B

III . CONCLUSION

For the foregoing reasons, and upon consideration of the defendant Employer's renewed Motion for Judgment as a Matter of Law, or in the alternative for a New Trial, and the response of plaintiff Durko, the motion will be denied.

s/ Thomas I. Vanaski
Thomas I. Vanaski
United States District Judge

DATED: December 24, 1995

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 4:CV-93-1284

(JUDGE VANASKIE)

CARMELA F. DURKO,

Plaintiff

V.

OI-NEG TV PRODUCTS, INC., AND GLASS, MOLDERS, POTTERY, PLASTICS & ALLIED WORKERS INTERNATIONAL UNION AFL-CIO, CLC No. 243,

Defendants

ORDER

AND NOW, THIS 29th **DAY OF DECEMBER, 1995,** for the reasons set forth in the accompanying Memorandum, **IT IS HEREBY ORDERED:**

1. The Defendant OI-Neg TV Products, Inc.'s Renewal of Motion for Judgment After Trial; Alternative Motion For New Trial (Dkt. Entry # 80) is **DENIED.**

s/ Thomas I. Vanaski
Thomas I. Vanaski
United States District Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF PENNSYLVANIA FILED SEPTEMBER 28, 1994

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 4:CV-93-1284

CARMELA F. DURKO,

VS.

OI-NEG TV PRODUCTS, INC., AND GLASS, MOLDERS, POTTERY, PLASTICS & ALLIED WORKERS INTERNATIONAL UNION AFL-CIO, CLC NO. 243

XX **Jury Verdict.** This action came before the Court for a Trial by Jury, The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that, in accordance with the jury's responses to the Special Verdict Questions attached hereto:

1. Judgment is hereby entered in favor of Defendants OI-NEG TV Products, Inc. and Glass, Molders, Pottery, Plastics & Allied Workers International Union AFL-CIO CLC NO. 243 on Plaintiff's claim that she was removed from the position of Assistant Furnance Operator because of her sex.

2. Judgment is entered in favor of plaintiff and against OI-NEG TV Products, Inc. in the amount of $50,000 on plaintiff's claims concerning hostile environment sexual harassment.

Appendix C

3. Judgment is entered in favor of plaintiff and against defendant Glass, Molders, Pottery, Plastics & Allied Workers International Union AFL-CIO CLC NO. 243 in the amount of $50,000 in compensatory damages and in the amount of $25,000 in punitive damages on plaintiff's claims that this defendant discriminatorily failed to pursue grievances of sexual harassment on her behalf.

DATE: Sept. 28, 1994 CLERK: LANCE WILSON

s/ Joseph F. Laughan
Deputy Chief

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 4:CV-93-1284

(JUDGE VANASKIE)

CARMELA F. DURKO,

Plaintiff,

vs.

OI-NEG TV PRODUCTS, et. al,

Defendants.

SPECIAL VERDICT FORM

A. Plaintiff's Claim Against Techneglas

1. Has plaintiff proved by a preponderance of the evidence (a) that her gender was considered by Techneglas in its decision-making processes concerning the Snopeck grievance and Plaintiff's grievances dealing with the assistant furnace operator position, and (b) that Plaintiff's sex was a determinative factor in the decisions of Techneglas resulting in the resolution of those grievances and the removal of Plaintiff from the position of assistant furnace operator?

Yes ____ No ✓

Proceed to Question No. 2.

Appendix C

2. Has Plaintiff proved by a preponderance of the evidence that (a) she was subjected to hostile work environment sexual harassment, and (b) that Techneglas was aware that she was being subjected to a sexually hostile work environment and failed to take appropriate corrective action?

Yes ✓ No ____

If your answer to Question No. 1 or No. 2 is yes, proceed to answer Question Nos. 3 and 4. If your answer to both Question Nos. 1 and 2 is no, do not answer Question Nos. 3 or 4 and proceed to Question No. 5.

3. Under the law as given to you in these instructions, state the amount of compensatory damages Plaintiff should be awarded from Techneglas?

Amount $50,000.

Go to Question No. 5.

4. Under the law as given to you in these instructions, state the amount of punitive damages, if any, that Techneglas should be ordered to pay. If you find that Plaintiff has failed to prove by a preponderance of the evidence that Techneglas is liable for punitive damages, write in zero ("0") in the space provided.

Amount $0.

Appendix C

B. Plaintiff's Claims Against The Union

5. Has Plaintiff proved by a preponderance of the evidence (a) that her gender was considered by the Union in its decision-making processes concerning the Snopeck grievance and Plaintiff's grievances dealing with the assistant furnace operator position, and (b) that her gender was a determinative factor in the decisions of the Union resulting in the resolution of those grievances and the removal of the Plaintiff from the position of assistant furnace operator?

Yes ____ No ✓

Proceed to Question No. 6.

6. Has Plaintiff proved by a preponderance of the evidence that (a) she was subjected to hostile work environment sexual harassment, and (b) the Union discriminatorily failed to pursue sexual harassment grievances on behalf of Plaintiff?

Yes ✓ No____

If the answer to either Question Nos. 5 or 6 is yes, proceed to Question Nos. 7 and 8. If the answer to both Question Nos. 5 and 6 is no, the foreperson should sign this verdict form and notify the bailiff that the jury has reached its verdict.

7. Under the law as given to you in these instructions, state the amount of compensatory damages Plaintiff should be awarded from the Union.

Amount $50,000.

Appendix C

8. Under the law as given to you in these instructions, state the amount of punitive damages, if any, that the Union should be ordered to pay. If you find that Plaintiff has failed to prove by a preponderance of the evidence that the Union is liable for punitive damages, write in zero ("0") in the space provided.

Amount $25,000 .

The foreperson must sign and date this verdict form.

DATE: September 26, 1994

s/ illegible
Foreperson

APPENDIX D — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED SEPTEMBER 21, 1994

U.S. DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

93-CV-1284

CARMELA F. DURKO,

Plaintiff,

VS

OI-NEG TV PRODUCTS, INC.,

Defendant

VS

GLASS, MOLDERS, POTTERY PLASTICS & ALLIED WORKERS INTERNATIONAL AFL-CIO, CLC NO. 243,

Defendant

VOLUME II

JURY TRIAL

BEFORE: JUDGE THOMAS I. VANASKIE

DATE: WEDNESDAY, SEPTEMBER 21, 1994

LOCATION: POST OFFICE BUILDING
SCRANTON, PENNSYLVANIA

Appendix D

REPORTER: JOANN J. VANCOSKY
NOTARY PUBLIC

G & G REPORTING AGENCY, INC.
701 SOUTH MAIN STREET
OLD FORGE, PENNSYLVANIA 18518

(717) 457-8811 - (800) 624-8811

* * *

[Commencing at 22] Q. Yes, on the tour.

A. No, I was not told that on the tour.

Q. Did you later learn in your training that that could happen, that if you were working a late shift, 1 or 2:00 in the morning, an emergency occurred, it would be your duty to aid the Furnace Operator in emergency repairs?

A. No, I wasn't.

Q. During the time you were having this training, you indicated that some very distasteful, some very off-colored obscene remarks were made to you by certain people, and I recognize that those are sensitive areas. But they've been discussed now, and I'm obliged to ask you some questions about that.

When those questions were asked to you, you indicated — I believe in your testimony — that they were revulsive and that they were hard to tolerate, that they were offensive — as remarks like that certainly well would be — and that there were a whole

series of people that you went to to discuss what was going on with the people who were making those remarks to you. Do you recall that?

A. Yes.

Q. I think you indicated that you went to a Mr. Thomson?

[23] A. Yes, I did.

Q. And Mr. — I believe it's Warnick and a Mr. Moska. Are any of those people in management?

A. No, they're Union.

Q. They're Union. Did you ever, when these revolting things were being done, go to anyone in management and make a complaint?

A. No, I didn't.

Q. You've been an employee, a good employee, of OI-NEG for a long time. During the period of time that you were there, did you ever learn whether or not the Company has a policy on sexual harassment or discrimination?

A. No.

Q. You're not aware of that?

A. I was aware of taking my steward in with me when I went in, and I couldn't get him to do that.

Q. Taking your steward in with you for what?

A. To help me out.

Q. To help you out for what now?

A. To explain the story to the steward and to take him in with me.

Q. Have you ever seen the eight bulletin [24] boards where there has been posted for the last year, last few years, prior to 1991, a written statement of this Company's policy against people who sexually harass Company employees? Have you ever read that notice on the eight bulletin boards that it's posted on?

A. After the fact, yes.

Q. Well, why isn't it that you couldn't have read it before the fact? Are you saying they weren't posted?

A. I didn't say they weren't posted.

Q. And when you did read them, did it say you go to the Union to make your complaint or did it say you go right to management, and when you make your complaint, it would be kept in the strictest of confidence. Does it say that?

A. I was always taught to go to a steward first.

Q. I don't know who ever taught you that, but if — you do read, right, because you read that book and you passed that test.

MR. BORLAND: Objection, Your Honor.

Appendix D

BY MR. PICCONE:

Q. And you read that article.

THE COURT: You're getting a little

* * *

[27] A. I don't know whose writing this is. When I handed that to Joe Thomson, I didn't get no answer on this. I only had this handed in. I got him to sign the bottom of it, that's it. This is all that was written down, and this was stapled to the back of it. I never got an answer.

Q. We'll get to that. These two typewritten pages, do you know who prepared those?

A. Me and my lawyer.

Q. I'm sorry?

A. Me and my lawyer.

Q. This document is dated February 6, 1992. It says "date filed." That's the only date I see on it, but do you see, in the two pages that you and your lawyer prepared, or in the first page, any reference to any sexual harassment in terms of either comments, as to your dress, or —

A. No, I don't.

Q. — names called?

A. No, I don't.

Q. Would you look at Plaintiff's Exhibit No. 11, please, and this is grievance form dated June 19th, 1992. Is that your signature?

A. Yes, it is.

Q. Do you know who prepared the first sheet?

[28] A. Mike Lieback.

Q. I'm sorry?

A. Mike Lieback.

Q. Mr. Lieback works for the Union?

A. Yes, he does.

Q. There is, again, on this sheet, a second sheet which has handwriting. Are you familiar with that sheet?

A. No, I'm not.

MR. PICCONE: And again, Your Honor, as with P-10 and P-11, the second sheet, the witness has indicated she's not familiar with it.

BY MR. PICCONE:

Q. On the last page, there are three paragraphs, typed paragraphs. Would you look at those a moment?

A. (Reading). Yes.

Q. Do you know who prepared that?

A. Me and my lawyer.

Q. In looking at that, do you see any reference to any type of sexual harassment either in terms of comment to your dress or just outrageous names called to you?

A. No, I don't.

Q. This is Plaintiff's Exhibit No. 12, and,

* * *

[30] Q. In the paragraph called, What has happened — "What happened?" Again, is there any reference to any sexual harassment against you in terms of either commenting upon how you were attired or dressed or in calling you outrageous names?

A, No, there isn't.

Q. And this is Plaintiff's Exhibit No. 13, again another grievance, dated October the 27th, '92. It purports to bear your signature. Is that your signature?

A. Yes, it is.

Q. And beneath that there is again Randy R. —

A. Robbins.

Q. — Robbins, who works for the Union; is that correct?

A. Yes.

Q. Again, who would have written the handwriting on the first sheet? Whose is that?

A. Randy Robbins.

Q. On the second sheet, there is again some handwriting. Are you familiar with that?

A. No, I've never seen this before.

Q. You never saw the second sheet?

A. Not when I filed these. No, I never seen

* * *

[32] Q. Is there any reason why, when you were filing these grievances, that you did not indicate that this conduct was taking place, that members of the Union, the very Union that you belong to, were, you know, calling you just outrageous names, for which there was no justification?

A. Because I didn't even get answers to these. How was I going to get answers to those?

Q. But then you're saying that because they wouldn't support you in one area, you weren't going to bother with the sexual harassment charges?

A. I told them about the sexual harassment charges. They never put it down on paper. They put this down on paper, though.

Q. Well, is there a difference?

A. Yes.

Q. I mean, if you made a complaint that you were denied a job and they weren't going to help you, you still made the complaint and the grievances four times, right?

A. That was the only thing I was allowed to put down on paper.

Q. Well, in two of these exhibits — three of those exhibits, two have typewritten sheets that you and your lawyer prepared, and the third has a

* * *

[34] Q. All those stewards.

A. Yes.

Q. Did you ever once, when this was happening, go to management and say, you know, "This is happening to me. I'm trying to do the proper thing. I'm trying to grieve this in accordance with our contract. This is what governs our relationship, and they won't let me do it." Did you ever go to management, to the Company, and say that?

A. No, I didn't.

Q. Did there come a time when, I'm sure, you must have been totally, totally frustrated that you wrote a letter to the president of your Union?

A. No.

MR. PICCONE: Maybe I didn't artfully ask that question. May I ask it again, with the Court's permission?

BY MR. PICCONE:

Q. Did you ever write a letter to the president of the International Union?

A. Yes, I did.

MR. PICCONE: I only have one of this exhibit. I'll make more copies and make them available. I'll mark this as Defendant's Exhibit 31, Your Honor. I'm told that's the — I'll try not to

* * *

[273] event, it was a routine event. And I don't see, number 1, that it presents any special hardship in defense. And, number 2 — I don't — and number 2, I don't see that it doesn't spell out, with as much clarity as exists, exactly what she did and how she did it.

MR. YALLER: Your Honor, if I know that on November 3rd, 1992, Joe Thomson was seen running away from the Plaintiff at 3:30 p.m., you know, in the Furnace Department, I can find employees to corroborate or challenge that allegation.

If we have, Oh, about once a week for a year and a half, I don't know how I attack that. I don't think I can attack that and that goes for every alleged report made to Union officials.

Appendix D

This is, as I indicated on the opening, a terrifically controversial question of fact, and we're at a marvelous disadvantage in defending against it.

THE COURT: Well, I think you are at a disadvantage that it is easier to defend when you have some specificity with respect to matters, particularly of this nature. I do think you are handicapped by that, and it's difficult obviously to defend on that.

Mr. Thomson on the stand he's going to have to say, you know, it didn't happen that way or it never happened or — I'm not sure what he's going to [274] say, and the same thing with respect to the others. But I do think in a case like this it's the quality of the Plaintiff's evidence, and it is unfortunate, it seems to me, if you have a — if the claim was going to be that essentially that there was pervasive sexual harassment here, you would think there would be some corroboration on the Plaintiff's part, someone who wanted to come forward and, you know, besides the husband, saying, This is what my wife told me, somebody else coming and saying they witnessed some of this.

It's hard to imagine that, with respect to the intercom contentions, there isn't somebody in the plant who would be able to corroborate that, if that, in fact, occurred in the manner that she says it has occurred. I am very much troubled by it.

On the other hand, I don't think that a motion for judgment of law, that I can grant judgment on that issue. I can also say to you, though, that I'm authorized, under the rules, to defer ruling on that.

And rather than denying your motion, I'm going to defer

on it, and it's something that I can revisit at the conclusion of all of the evidence if I think it's a situation where I'm presented with absolutely no corroboration on one side and lots on the other side.

[275] It may be significant to persuade me that there's not enough evidence warranting submission of this claim to the jury.

MR. YALLER: Okay. And the final one is the whole essence, the whole issue of seniority entitlement of the Plaintiff, which used to be the central piece of this case.

We have, through the Plaintiff's case, heard that a posting was put up, that months prior to the posting, Jack Shank had alerted us, We're not going to follow this Berlinski decision.

Now, we were supposed to grieve his May 23 letter, maybe we were supposed to grieve that in January as well, or whenever it was that that came out. He says it was the previous year.

We didn't grieve it until May 23, and if Your Honor is going to find it to be an untimely grievance when Plaintiff, as they called Joe Lutecki, their own witness, is saying, I grieved when I was under — when I was told C. Durko, whoever that is, had bid the job, even though, as a matter of fact, she had not — C. Durko — had not completed the five day test or testing period but was under the impression that that had been conveyed based upon the Company's document given to him.

* * *

APPENDIX E — OI-NEG TV PRODUCTS INC. HARASSMENT POLICY

OI-NEG TV PRODUCTS, INC.

HARASSMENT POLICY

April 15, 1990

This is a reaffirmation of the OI-NEG policy that it will maintain a discrimination free work environment for all employees. In keeping with this policy, the Company will not tolerate any form of harassment by any of its employees, supervisors, or managers. Part of maintaining a good working atmosphere includes freedom from verbal or physical sexual advances, as well as a work place free from harassment based on sex, race, religion, age, national origin, veterans status or handicap. Restating portions of the President's Corporate Policy statement on Equal Employment Opportunities:

> "All OI-NEG TV Products Managers are responsible for the application of this policy and will be evaluated on their effectiveness. Initiating, supporting, and following up on programs and practices designed to develop understanding, acceptance, commitment and compliance within the framework of this policy are included in their area of responsibility."

Sexual harassment can be defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

Appendix E

- Submission to the conduct is made either an explicit or implicit condition of employment;

- Submission to or rejection of the conduct is used as the basis for an employment decision affecting the harassed employee; or

- The harassment substantially interferes with an employee's work performance or creates an intimidating, hostile, or offensive work environment.

Harassment based on race, age, natural origin or religion, veteran's status, or handicapped may be comprised of verbal or physical conduct of an "unwelcome" nature similar to sexual harassment.

The company considers sexual harassment to be a major offense which can result in the suspension or discharge of the offender.

Any employee or applicant that feels he or she has been harassed should report such incidents to his or her supervisor, personnel, or any member of management. All complaints must be handled in the strictest confidence. No form of reprisals will be taken against any person who presents a complaint of harassment.

s/ D.F. St. John
D.F. ST. JOHN
PRESIDENT
OI-NEG TV PRODUCTS, INC.

Appendix E

OI-NEG TV PRODUCTS, INC.

HARASSMENT POLICY

June 1, 1991

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s/ Terry L. Wilkison
T.L. WILKISON
OI-NEG TV PRODUCTS, INC.

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s/ L.T. Hickey, Jr.
L.T. HICKEY, JR.
PRESIDENT
OI-NEG TV PRODUCTS, INC.

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s/ L.T. Hickey, Jr.
L.T. HICKEY, JR.
PRESIDENT
OI-NEG TV PRODUCTS, INC.

Supreme Court, U.S.
FILED
MAR 13 1997
CLERK

No. 96-1263

In The

Supreme Court of the United States

October Term, 1996

OI-NEG TV PRODUCTS, INC.,

Petitioner,

vs.

CARMELA F. DURKO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below properly upheld the factual finding of the jury that the employer had actual and/or constructive notice that Ms. Durko was being sexually harassed?

2. Whether the courts below properly upheld the factual finding of the jury that the employer had an opportunity to demonstrate the effectiveness of its grievance procedure, and that such procedure was ineffective?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
A. Procedural History	1
B. Factual Background	2
Reasons for Denying the Writ	6
Standard for Granting the Writ of Certiorari	6
I. The Courts Below Properly Upheld The Factual Finding Of the Jury That The Employer Had Actual And/Or Constructive Notice That Ms. Durko Was Being Sexually Harassed.	8
II. The Evidence At Trial Did Not Establish That The Employer Had An Effective Grievance Procedure, That Such Procedure Was Known to Ms. Durko, And That Ms. Durko Failed To Avail Herself Of That Grievance Procedure.	12
Conclusion	16

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Andrews v. City of Philadelphia, 895 F.2d 1469 (3rd Cir. 1990) 9

Bouton v. BMW of North America, 29 F.3d 103 (3rd Cir. 1994) 8, 9, 12, 13, 15

Davis v. United States, 417 U.S. 333 (1974) 7

General Copy Pictures Corp. v. Western Electric Co., 304 U.S. 175, 82 L. Ed. 1273, 58 S. Ct. 849 (1938) ... 6, 7

Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982) ... 11

Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) 9

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 7

Meritor Savings Bank, F.S.B., 477 U.S. 57 (1986) ... 9, 15

NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) ... 7

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 7

Taylor v. United States, 493 U.S. 906 (1989) 7

Wisniewski v. United States, 353 U.S. 901 (1957) 7

Contents

Page

Statutes Cited:

42 U.S.C. § 2000e-2(a), *et seq.* 1

43 Pa. C.S.A. § 951, *et seq.* 1

Rules Cited:

Supreme Court Rule 10 ..... 6, 7, 12

Supreme Court Rule 10(c) 8

Other Authorities Cited:

Restatement (Second) of Torts § 219 9

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STATEMENT OF THE CASE

A. Procedural History

This action was commenced by Complaint filed by Carmela F. Durko on August 17, 1993, setting forth a cause of action against OI-NEG TV Products, Inc., hereinafter "Employer," for discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), *et seq.*, as well as a claim of discrimination based on sex pursuant to the Pennsylvania Human Relations Act, 43 Pa. C.S.A. § 951, *et seq.* (App. 12-94).[1]

The Complaint further sets forth similar causes of action against Glass, Molders, Pottery, Plastics & Allied Workers International AFL-CIO, CLC No. 243, hereafter "Union" for discrimination in violation of Title VII and the PHRA. (*Id.*).

A jury trial commenced on September 20, 1994 and concluded on September 26, 1994. With respect to the Employer, the jury found that Ms. Durko proved by a preponderance of the evidence that she was subjected to hostile environment sexual harassment, and that the Employer was aware that she was being subjected to a sexually hostile work environment and failed to take appropriate corrective action (App. 132-135). The jury awarded compensatory damages from Employer in the amount of fifty thousand dollars ($50,000) (App. 133).

With respect to the Union, the jury found that Ms. Durko proved by a preponderance of the evidence that she was subjected to hostile environment sexual harassment and that the Union discriminatorily failed to pursue sexual harassment grievances on her behalf (App. 134). The jury awarded fifty

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1. "App." refers to the joint appendix filed with the Court of Appeals for the Third Circuit.

thousand dollars ($50,000) in compensatory damages and twenty five thousand dollars ($25,000) in punitive damages from the Union (App. 134-135). Judgment was entered by the District Court on September 28, 1994 (App. 423).

On or about October 12, 1994, both Employer and Union filed post-trial motions (App. 428-438). The motions of the Employer and Union were denied by the District Court by Memoranda and Orders dated December 29, 1995 and December 31, 1995 respectively (App. 1653-1691, 1672-1694).

The Employer filed its appeal to this Honorable Court on January 26, 1996 (App. 1695) with the Union filing its appeal on January 29, 1996 (App. 1696).

The Employer and Union filed appeals to the Third Circuit which were denied by Order dated November 12, 1996.

B. Factual Background

Carmela Durko became employed by Employer on or about March 31, 1986 (App. 15). At all relevant times, Ms. Durko was a member of Local 243 of the Glass, Molders, Pottery, Plastic & Allied Workers International Union AFL-CIO-CLC, hereinafter "Union" (App. 15).

The issues pertinent to the present Petitions arise from the jury's finding that Ms. Durko was subjected to hostile work environment sexual harassment of which the Employer was aware, and failed to take appropriate action, as well as the finding that the Union discriminatorily failed to pursue sexual harassment grievances on Ms. Durko's behalf (App. 132-135).

The jury found for the Employer and Union with respect to Ms. Durko's claim that she was removed by the Employer from

her position as Assistant Furnace Operator because of her sex, and that her gender was a determinative factor in the Union's decisions involving resolution of Ms. Durko's grievances relative to such removal. These verdicts in favor of the Employer and Union relative to Ms. Durko's claim of recall rights to the Assistant Furnace Operator's position have not been appealed and therefore are not before this Honorable Court.

The sexual harassment of Ms. Durko began in June of 1991 when she began working in the Batch and Furnace Department as an Assistant Furnace Operator (App. 16). Ms. Durko was initially given a tour by her foreman, Ron Walsh, during which Ms. Durko was made to crawl under the extremely hot furnace and go to the batch house to a height of approximately five stories (App. 541-545). The only protective equipment given to Ms. Durko to wear during this tour was a pair of paper coveralls, when the required safety equipment consisted of material coveralls and a respirator to prevent the inhalation of dangerous chemicals (App. 541-550).

Ms. Durko testified that from her observations of men being taken on similar tours, none were taken underneath the furnace (App. 675).

During the time Ms. Durko worked as an Assistant Furnace Operator, Mr. Walsh, her foreman and a member of management, would continually call Ms. Durko vile and disgusting names containing references to her gender, such as "dumb cunt" and "stupid bitch" (App. 564). Regarding the time it would take Ms. Durko to qualify as an Assistant Furnace Operator, Mr. Walsh stated that it would take her eighteen months to be qualified, and if she would be "nice to him", it would take her nine months (App. 563). Ms. Durko immediately made Mr. Walsh aware of her anger regarding such comment (App. 564).

On one of David Troutline's tours, Ms. Durko was requested to push a heavy charger to see if she could handle the job (App. 582). After Ms. Durko pushed the charger with all of her might, and she could not do it, Mr. Troutline stated "Well, that's part of your job duties. If you can't do that, well then you should turn down the job" (App. 616). During this incident, Mr. Troutline purposely neglected to tell Ms. Durko that the brake was on, with Ms. Durko only finding out that the brake was engaged when another worker approached her and took the brake off (App. 582).

Ms. Durko was also sexually harassed by Tom Wozniak, a Furnace Operator in the Batch and Furnace Department. During her initial five day trial period at the position of Assistant Furnace Operator, Mr. Wozniak would tell her that she "broke the barrier" by being the first woman as an Assistant Furnace Operator, kept taking her on tours of the "hot spots" of the department and repeatedly told her "You'll never do it. You'll never make it", as well as telling her "It's not a job for a woman" (App. 554-555).

While working with Ms. Durko, Mr. Wozniak would remark that she was "flat chested" approximately once a day for the eighteen month period Ms. Durko was in the Batch and Furnace Department (App. 573).

Approximately three months after she had begun the position in June of 1991, Mr. Wozniak began throwing hard cover books at her whenever he would get angry, striking her on one occasion (App. 570, 684).

Walter Snopeck, who was tasked with training Ms. Durko as an Assistant Furnace Operator, also called her crude names containing references to her gender, such as "dumb cunt" and "stupid bitch," plenty of times during the period of time she worked in the Batch and Furnace Department (App. 567-568).

Regarding the incidents of sexual harassment, Ms. Durko made reports to Union Stewards Randy Robbins, Mike Lieback, Joe Thomson, Gene Warnick, and Tom Yankey, as well as Union President Peter Moska and Union Business Agent Joseph Lutecki (App. 565-571, 574-585). Although certain Union Representatives filed grievances regarding Ms. Durko's recall rights, no Union Representative would submit a sexual harassment charge, despite repeated requests by Ms. Durko (App. 583).

Ms. Durko filed a Complaint with the Pennsylvania Human Relations Commission on August 4, 1992, containing, *inter alia* allegations of a sexually hostile work environment by both Employer and Union (App. 279).

Margaret Guffrovich, a witness for Employer, stated that such complaint was served on Employer as early as September, 1992 (App. 1439).

Further, at trial, it was stipulated *as fact* by the Employer and all other parties that the Employer had actual notice of Ms. Durko's complaints of sexual harassment by Mr. Walsh, a member of management. The stipulation of fact was as follows:

> Union President, Peter Moska, asked Margaret Guffrovich, from personnel, to investigate Ms. Durko's complaints of harassment against Mr. Walsh. After speaking with Mr. Walsh, Ms. Guffrovich reported back to Mr. Moska that there was no basis for Ms. Durko's complaints.

(App. 525).

Mr. Moska also confirmed the reports of sexual harassment to the Personnel Department (App. 1325-1335).

Mr. Walsh testified that he attended a meeting with Margaret Guffrovich and Mary Reynolds, another member of management, regarding the allegations of harassment, after which he did not hear back from either member of management and was not disciplined (App. 991-996).

On January 13, 1993, Ms. Durko was transferred to the Forming and Selecting Department because her temporary bid as Assistant Furnace Operator had expired (App. 588). Ms. Durko was subjected to being called a variety of vulgar names over the public address system, accompanied by loud moaning, with her name being loudly screamed (App. 593). It was Ms. Durko's unrebutted testimony that she told her foreman, Lenny Brown, about this (*id.*), as well as Union President Peter Moska. Further, Ms. Durko and Mr. Moska both reported the harassment to William Konopasek, Human Resource Supervisor, a member of management (*id.*) After meeting with Mr. Konopasek, speakers were allegedly put in his office, but Ms. Durko testified that the harassment continued until she left the Forming and Selecting Department (*id.*) At trial, Mr. Konopasek acknowledged that he did not investigate the matter, as Ms. Durko did not provide him information as to who was responsible for the noises (App. 906-909).

REASONS FOR DENYING THE WRIT

Standard for Granting Writ of Certiorari

The rules of this Court state that a Petition for Writ of Certiorari "will be granted only for compelling reasons." Sup. Ct. R. 10.

In general, the Supreme Court will not grant a Writ of Certiorari merely to review evidence or inferences drawn from it. *General Copy Pictures Corp. v. Western Electric Co.*, 304

U.S. 175, 82 L. Ed. 1273, 58 S. Ct. 849 (1938). Certiorari will also be denied if the case involves circumstances or issues which are not likely to be repeated, *see Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (noting that the Court reviews issues that are "beyond the academic or the mere episodic"); 13 James W. Moore, ed., *Moore's Federal Practice*, para. 810.21 at SC 10-23 (2d ed. 1995) (stating that the Court will not be inclined to review "an issue that is unlikely to recur" or "results from a unique factual situation"), or if "the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Moreover, certiorari will be granted "only in cases involving principles, the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority" between the Courts of Appeals. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (*quoting Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)).

Finally, the Court has refrained from resolving conflicts that arise between panels within the same circuit, on the grounds that such conflicts should be resolved by the Court of Appeals internally. *See, e.g., Taylor v. United States*, 493 U.S. 906 (1989); *Davis v. United States*, 417 U.S. 333, 340 (1974); *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

I.

THE COURTS BELOW PROPERLY UPHELD THE FACTUAL FINDING OF THE JURY THAT THE EMPLOYER HAD ACTUAL AND/OR CONSTRUCTIVE NOTICE THAT MS. DURKO WAS BEING SEXUALLY HARASSED.

The Employer's Petition for Writ of Certiorari with regard to the issue of whether the Employer had actual and/or constructive notice that Ms. Durko was being sexually harassed must be denied as Employer merely asserts that the court below misapplied a properly stated rule of law, or that erroneous factual findings were made by the jury.

Supreme Court Rule 10(c), states in pertinent part:

> A petition for Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Employer asserts that Ms. Durko failed to prove that management-level employees had actual or constructive notice about the existence of a sexually hostile work environment.

Regarding the merits of the Employer's claim, the testimony at trial, as well as the Employer's own Stipulation of Fact, clearly establishes both actual and constructive notice to the Employer of the sexual harassment Ms. Durko was enduring.

Agency principles are employed when deciding employer liability for sexually hostile work environments. *Bouton v. BMW of North America,* 29 F.3d 103, 106 (3rd Cir. 1994), *citing*

Meritor Savings Bank, F.S.B., 477 U.S. at 72. Three potential bases for holding employers liable for sexual harassment perpetrated by their employees under § 219 of the Restatement (Second) of the Agency are as follows: (1) torts committed by employees within the scope of their employment; (2) an employer's negligent failure to discipline or fire, or failure to take remedial action upon notice of harassment; and (3) actions taken by employees in reliance upon apparent authority or if they were aided by their agency relationship. *Bouton*, 29 F.3d at 106.

The above agency principles direct that liability exists where the defendant knew or should have known of the harassment and failed to take prompt remedial action. *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1486 (3rd Cir. 1990). Thus, if the evidence permits an inference that management level employees had actual or constructive knowledge about the existence of a sexually hostile environment and failed to take prompt and adequate remedial action, the employer's post-trial motions must be denied. *See Andrews, supra*; *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983).

Employer then goes on to quote a very narrow passage of Ms. Durko's testimony which indicates that although Ms. Durko made complaints of sexual harassment to Union Stewards Thomson and Warnick, as well as Union Business Agent Joseph Lutecki and Union President Peter Moska, that she never made such complaints directly to management (Employer's Petition 7-11). Such citation ignores vast amounts of testimony indicating that the Employer had actual notice, some of which was from the Employer's own witnesses. Also ignored is the Employer's stipulation to the fact of actual notice which was presented to the jury (App. 525).

Obviously, the cited passage of Ms. Durko's testimony deals

with *actual notice* of the sexual harassment to the Employer and does not deal with the constructive notice provided due to the pervasiveness of such contact.

Regarding actual notice, management personnel were indeed aware that Ms. Durko was being sexually harassed, as Ron Walsh, her foreman, was actually performing the harassment through his plant tours given to Ms. Durko without providing her with the required safety equipment, as well as his gender-specific name-calling performed on a regular basis from June of 1991 until Ms. Durko left the department in January of 1993 (App. 564). Also, as stated previously, Ms. Durko directly complained to Mr. Walsh about his comment about the length of time it would take her to be qualified as an Assistant Furnace Operator if "she was nice" to him (App. 564). Further, Employer acknowledges receiving a PHRC Complaint on September 30, 1992, regarding the sexual harassment allegations (App. 1439). Further, the Employer stipulated to the *fact* of having actual notice of Ms. Durko's complaints of sexual harassment as follows:

> Union President, Peter Moska, asked Margaret Guffrovich, from personnel, to investigate Ms. Durko's complaints of harassment against Mr. Walsh. After speaking with Mr. Walsh, Ms. Guffrovich reported back to Mr. Moska that there was no basis for Ms. Durko's complaints.

(App. 525).

The Employer's own witness, Margaret Guffrovich, Assistant Human Resource Supervisor, admitted that she was aware of Ms. Durko's allegations of sexual harassment through Ms. Durko's complaint to the PHRC as well as through a meeting

with Union President Peter Moska, and further admits that an investigation subsequently ensued (App. 1439). Ms. Durko also provided unrebutted testimony that she reported the sexual harassment occurring over the loudspeaker to her foreman, Lenny Brown, and William Konopasek, the Human Resource Manager, both members of management (App. 594). Ms. Durko's complaints of sexual harassment were also reiterated in her Amended PHRC Complaint served on management in February of 1993 (App. 705). Again, the company stipulated *to the fact* of actual notice at trial (App. 525).

In the present case, no prompt and effective remedial action was taken by the Employer as no employee was disciplined for such harassment, and the harassment by Mr. Walsh, Mr. Snopeck, and Mr. Wozniak continued on a regular basis from June of 1991 until January of 1993, a period after the actual notice provided by the PHRC Complaint (App. 574). Further, the harassment occurring over the loudspeaker, which began when Ms. Durko was transferred to the Forming and Selecting Department in January of 1993, continued even after Ms. Durko's meeting with William Konopasek (App. 594) who further admitted that he did not investigate Ms. Durko's complaints (App. 905-909).

Even after directly notifying Mr. Konopasek and Ms. Guffrovich, Ms. Durko testified that there was never a time when the sexual harassment diminished and that the harassment actually got worse after the meeting with Mr. Konopasek (App. 696-699).

In addition to the actual knowledge of the harassment as indicated above, the Employer also had constructive knowledge of the harassment through its pervasiveness. *See Henson v. Dundee,* 682 F.2d 897, 905 (11th Cir. 1982). In fact, the jury was instructed, without objection, that the Respondent can demonstrate that the Employer knew of the harassment by

showing the pervasiveness of such harassment (Docket Entry 67). The jury subsequently found in Ms. Durko's favor.

Based on the above discussion, it is asserted that the Employer had actual notice of the allegations of sexual harassment on repeated occasions as well as constructive notice through the pervasiveness of such harassment carried out by numerous employees, including members of management.

II.

THE EVIDENCE AT TRIAL DID NOT ESTABLISH THAT THE EMPLOYER HAD AN EFFECTIVE GRIEVANCE PROCEDURE, THAT SUCH PROCEDURE WAS KNOWN TO MS. DURKO, AND THAT MS. DURKO FAILED TO AVAIL HERSELF OF THAT GRIEVANCE PROCEDURE.

Employer's Petition for Writ of Certiorari regarding the existence of a grievance procedure and Ms. Durko's alleged failure to use such procedure, should be denied as a mere allegation of error with regard to a factual finding, or a misapplication of the properly stated rule of law. Sup. Ct. R. 10.

Regarding the merits of the Employer's claim, Employer asserts that the evidence at trial established that OI-NEG had an effective grievance procedure, that it was known to Ms. Durko and that she failed to avail herself of that procedure, thereby absolving it from liability for hostile environment sexual harassment.

Employer cites *Bouton v. BMW of North America, Inc.*, 29 F.3d 103 (3rd Cir. 1994) in which the Third Circuit held that the existence of an effective grievance procedure known to the victim and that timely stops the harassment, shields the

Employer from Title VII liability for a hostile environment. *Id.* at 110. A review of the record indicates that none of the above elements are satisfied.

There exists evidence of record that Employer had a grievance procedure in effect (App. 624, 806-807, 909-912, 1440-1442). However, Ms. Durko stated that she did not read any such policy until after the fact (App. 624). However, even assuming Ms. Durko knew about the sexual harassment policy in effect, the record shows that Ms. Durko did report incidents of sexual harassment to the proper management personnel. This is contrary to Employer's assertion that Ms. Durko never apprised OI-NEG management that she was being sexually harassed.

Although Employer cites a very narrow passage of Ms. Durko's testimony, which, ignoring all other testimony in the case, tends to indicate that Ms. Durko did not report being sexually harassed to management, there was a multitude of testimony, including that of Employer's own witnesses that indicates that Ms. Durko, either herself or through a Union Representative did make management aware of such complaints.

Ms. Durko testified that she was subjected to being called a variety of vulgar names over the public address system, accompanied by loud moaning with her name being loudly screamed (App. 594). It was Ms. Durko's unrebutted testimony that she told her foreman, Lenny Brown, about this, as well as Union President Peter Moska (*id.*). Further, Ms. Durko and Mr. Moska both reported the harassment to William Konopasek, Human Resource Supervisor, a member of management (*id.*). After meeting with Mr. Konopasek, speakers were allegedly put in his office, but Ms. Durko testified that the harassment continued until after she left the Forming and Selecting Department (*id.*).

Mr. Konopasek acknowledged in his testimony that a meeting between himself, Ms. Durko, and Mr. Moska occurred, but stated that Ms. Durko allegedly did not inform him that the complaints were directed toward her. Mr. Konopasek further acknowledged that he did not investigate the matter, as Ms. Durko did not provide him information as to specifically who was responsible for the noises (App. 906-909).

Further, it was stipulated as fact between counsel and agreed by all parties that Union President Peter Moska asked Margaret Guffrovich, the Assistant Human Resource Manager, to investigate Ms. Durko's complaints of sexual harassment against Mr. Walsh, consisting of him repeatedly calling her crude and degrading names. After speaking with Mr. Walsh, Ms. Guffrovich reported back to Mr. Moska that there was no basis for Ms. Durko's complaints (App. 525). Such stipulation was also corroborated by the testimony of Peter Moska and Margaret Guffrovich (App. 1057-1058, 1325-1335).

Further, management of OI-NEG acknowledged that the company was in receipt of a complaint alleging sexual harassment against the Employer, filed by Ms. Durko with the Pennsylvania Human Relations Commission, served on the company as early as September of 1992 (App. 1439). Margaret Guffrovich testified that an investigation regarding the sexual harassment did ensue, consisting of her asking different managers if they had any information regarding the harassment (App. 1439). Mr. Walsh testified that he attended a meeting with Margaret Guffrovich and Mary Reynolds, another member of management, regarding the sexual harassment, and after such a meeting did not hear back from either member of management (App. 991-996). There is no evidence of record that anyone ever received any discipline because of Ms. Durko's allegations.

From the above discussion, the Employer's "grievance

procedure" was put into effect on at least two occasions, one dealing with the report of sexual harassment by Ronald Walsh to Margaret Guffrovich, and the other occasion being the report of sexual harassment over the intercom system to Mr. Konopasek. When Ms. Durko provided the name of her harasser, Ronald Walsh, to Ms. Guffrovich, the "grievance procedure" consisted of Ms. Guffrovich asking the harasser whether he committed the harassment, followed by his denial of such harassment, thus concluding the "grievance procedure". When Ms. Durko could not provide the name of her harasser via the intercom system, Mr. Konopasek decided that no further investigation was necessary. Such grievance procedure can hardly be labelled as "effective".

As stated earlier, a grievance procedure which is effective, *i.e.* one that is known to the victim and *timely stops the harassment,* shields the employer from Title VII liability for a hostile environment. *Bouton, supra*, at 110 (emphasis added). Ms. Durko testified that even after she made the complaints as enumerated above, such harassment continued (App. 594, 614, 642-645).

It is also important to note that the Employer did not present any evidence, such as statistical data, to substantiate its assertion that the grievance procedure was effective. The mere existence of a grievance process does not insulate an employer from liability under Title VII. *See Meritor Savings Bank, F.S.B. v. Vinson,* 477 U.S. 57, 72 (1986).

Thus, although management knew of Ms. Durko's sexual harassment complaints, whatever grievance procedure put in effect was obviously ineffective, thereby subjecting the Employer to liability for a hostile work environment based on sexual harassment.

CONCLUSION

For the foregoing reasons, the Petition of the Employer for a Writ of Certiorari should be denied.

Respectfully submitted,

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